STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71.

Supreme Court No. 130589

/

REPLY BRIEF OF ATTORNEY GENERAL IN SUPPORT OF CONSTITUTIONALITY OF 2005 PA 71

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Introduction

Principal briefs were filed in this matter by the Attorney General on July 19, 2006. A number of amicus curiae briefs were also filed at this time on behalf of various entities. The following brief is offered in reply to the Attorney General's brief opposing the constitutionality of the photo identification requirements set forth in section 523 of 2005 PA 71, as well as to similar arguments made by the various amici.

Arguments

I. This Court has jurisdiction to issue an advisory opinion on the constitutionality of section 523 of 2005 PA 71 because the photo identification requirements within that section take effect on January 1, 2007, thus meeting the prerequisites of Const 1963, art 3, § 8.

Const 1963, art 3, § 8 provides that this Court may only entertain requests for advisory opinions on legislation after it has been enacted "but before its effective date." The Attorney General's brief opposing the constitutionality of section 523 of 2005 PA 71 argues that this Court lacks the authority to issue an advisory opinion concerning the photo identification requirements included within this section because they were first enacted into law by 1996 PA 583, which became effective March 31, 1997, and the request by the House of Representatives is therefore untimely.[1] Although the requirements were later reenacted in section 523 of 2005 PA 71 with an effective date of January 1, 2007, because the photo identification requirements in both acts are the same, the Opposing Brief asserts that Michigan law requires that 2005 PA 71 be construed as a continuation of 1996 PA 583 and not as a new enactment. Therefore, the argument concludes, the March 31, 1997 effective date and not the January 1, 2007 date is controlling and the prerequisites of art 3, § 8 are not satisfied.

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[1] Brief of Attorney General Opposing Constitutionality of 2005 PA 71 (Opposing Brief), pp 2-6.

This argument is premised entirely on the first sentence of MCL 8.3u, which is included among the general rules of statutory construction provided by the Legislature in MCL 8.3a to MCL 8.3w. MCL 8.3u provides:

> The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. If any provision of a law is repealed and in substance re-enacted, a reference in any other law to the repealed provision shall be deemed a reference to the re-enacted provision.

First, the Opposing Brief's argument should be rejected because the language of art 3, § 8 is plain: January 1, 2007 is the stated "effective date" of section 523 of 2005 PA 71 and nothing in MCL 8.3u purports to address or change the effective date of a statute. Further, MCL 8.3u states a rule of *statutory* construction and is not relevant to a question concerning *constitutional* construction.

Moreover, even on the question of *statutory* construction, the Opposing Brief's argument fails to account for MCL 8.3. In this section, the Legislature has made clear that the general rules of construction will yield in the face of a clearly stated contrary expression of legislative intent[2]:

> In the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, *unless such construction would be inconsistent with the manifest intent of the legislature.*

The manifest intent of the Legislature is stated in enacting section 3 of 2005 PA 71. In this section, the Legislature made plain that eight sections of 2005 PA 71, including "section 523 . . . of the Michigan election law, [MCL 168.523] as amended by this amendatory act *take effect January 1, 2007.*" (Emphasis added). This clear expression of intent overrides any inconsistent

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[2] MCL 8.3 (emphasis added). See, e.g., *Robinson v Detroit*, 462 Mich 439, 461 n18; 613 NW2d 307 (2000); *Casco Twp v Secretary of State*, 472 Mich 566, 598; 701 NW2d 102 (2005) (Young, J., dissenting).

interpretation that might otherwise be suggested by MCL 8.3u.[3] Moreover, there is no Michigan case law ruling that the Legislature lacks the power to provide that an act shall take effect on a specific date *after* the expiration of 90 days from the end of the session at which it was passed.[4]

Finally, although case law is not entirely consistent on this point, ample authority supports the rule that, where a section of a statute is amended, the original ceases to exist and the section as amended supersedes it and the provisions carried over have their force from the new act and not the former.[5] These cases all hold that the effect of an act amending a specific section of a former act, in the absence of a savings clause, is to strike the former section of the law, "obliterate it entirely and substitute the new section in its place."[6]

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[3] See also House Resolution No. 199, adopted February 22, 2006 (4th whereas clause) (specifying that section 523 "will not take effect until January 1, 2007"). MCL 8.3u and the rule regarding the continuation of laws appear to have greater relevance under circumstances, unlike here, where vested rights might be affected by the passage of legislation. See *Stebbins v State Bd of Pharmacy*, 297 Mich 676, 678; 298 NW 327 (1941), citing *Wade v Farrell*, 270 Mich 562, 567; 259 NW 326 (1935).

[4] Const 1963, art 4, § 27 only addresses effective dates *before* expiration of the 90 days: "No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, *but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.*" (Emphasis added). For cases concerning specific dates see *Price v Hopkin*, 13 Mich 318, 326 (1865) (an act that provides it takes effect on specified date *subsequent* to general effective date takes effect on the specified date); *Genesee Merchants Bank & Trust Co v St Paul Fire & Marine Ins Co*, 47 Mich App 401, 405; 209 NW2d 605 (1973); *Progressive Mut Ins Co v Taylor*, 35 Mich App 633, 640 n2; 193 NW2d 54 (1971); *Weaver v Haney*, 32 Mich App 424, 427; 188 NW2d 905 (1971). See also Mayer, *Effective Date of Michigan Public Acts*, 56 Mich B J 116 (1977).

[5] *Detroit Club v Michigan*, 309 Mich 721, 733; 16 NW2d 136 (1944).

[6] *Detroit Club*, 309 Mich at 732. See also *People v Kevorkian*, 447 Mich 436, 462; 527 NW2d 714 (1994); *Kalamazoo City Ed Ass'n v Kalamazoo Public Schools*, 406 Mich 579, 601-602; 281 NW2d 454 (1979); *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 537-538; 164 NW2d 19 (1969); *People v Lowell*, 250 Mich 349, 355-356; 230 NW 202 (1930); *Morgan v Taylor School Dist*, 187 Mich App 5, 11; 466 NW2d 322 (1991), citing *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959). Contra *Perry v Hogarth*, 261 Mich 526, 530; 246 NW 214 (1933).

For all these reasons, the House of Representatives' request was timely under Const 1963, art 3, § 8 and this Court is authorized to issue an advisory opinion on the constitutionality of section 523 of 2005 PA 71.

II. Section 523 does not impose a severe burden upon the right to vote and therefore the statute does not warrant strict scrutiny review by this Court, and is constitutional under both the state and federal Equal Protection Clauses.

The Opposing Brief makes several arguments in support of its conclusion that the photo identification requirements are unconstitutional under the state and federal Equal Protection Clauses, none of which are persuasive.[7]

First, the Opposing Brief argues that section 523 is discriminatory on its face because it classifies individuals on the basis of those with picture identification and those without.[8] (Opposing Brief, pp 10, 12). Section 523 does not discriminate on its face, however, because it applies equally to all citizens offering to vote. Moreover, even if it has the effect of distinguishing between people based on those with photo identification and those without, such a distinction is not the kind of "invidious" discrimination prohibited by the state and federal Equal Protection Clauses.[9] As the United States Supreme Court observed in *American Party of Texas v White*, "'statutes create many classifications which do not deny equal protection; it is only

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[7] The amicus curiae briefs filed by the Governor's Office (Argument II (C)) and the Michigan Democratic Party (Argument II (E)), make similar arguments, which are unpersuasive for the same reasons.

[8] The Opposing Brief observes that there may be hundreds of thousands of people that fall into the "without" photo identification classification, relying on statistics based on the voting age population. (Opposing Brief, p 13). The brief asserts thus that thousands of "otherwise eligible voters [ ]could potentially be denied the right to vote." (Opposing Brief, p 13.) Focusing on the voting age population rather than the number of registered voters is misleading and inflates the potential numbers of affected individuals since that group includes people who are not registered to vote and may never register to vote.

[9] See *Avery v Midland Co, Texas*, 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d 45 (1968).

'invidious discrimination' which offends the Constitution.'"[10] Claims of invidious discrimination generally involve discrimination based on "suspect" factors such as race, national origin, ethnicity, or gender.[11] Thus, section 523's inadvertent classification of persons into classes of those with and without photo identification cannot reasonably be considered invidious discrimination.

Second, the Opposing Brief appears to argue that the photo identification requirement in and of itself imposes a severe burden upon the right to vote of those without picture identification, and that the affidavit option does not alleviate this severe burden because the affidavit requirement is also severely burdensome. (Opposing Brief, pp 13-18). The Opposing Brief, however, misconstrues both the affidavit process and the challenge process in making this argument.

Producing photo identification will not burden the majority of registered voters because most of these voters possess some form of identification. (See Proponent's Brief, p 17). Registered electors appearing at the polls and offering to vote who do not have identification will be offered the opportunity of signing the affidavit form, and voting. The Opposing Brief argues that it is unclear how many and what kinds of questions will be asked by elections officials of an elector seeking to exercise the affidavit alternative, and notes that the Secretary of State has not promulgated any rules to ensure uniform application of the photo identification requirements. (Opposing Brief, p 14.) Obviously it is true that no forms or rules have been promulgated regarding the photo identification requirements since OAG, 1997-1998, No 6930, p 1 (January 29, 1997) forestalled implementation of the requirements. The Secretary of State, however, has

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[10] *American Party of Texas v White*, 415 US 767, 781; 94 S Ct 1296; 39 L Ed 2d 744 (1974), quoting *Ferguson v Skrupa*, 372 US 726, 732; 83 S Ct 1028; 10 L Ed 2d 93 (1963).
[11] See, e.g., *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982).

broad authority to take actions to implement the statutes she is charged with enforcing under MCL 168.31, including the drafting of rules, regulations, or instructions.[12] Under this authority, the Bureau of Elections has advised that the affidavit form that will be created to implement section 523 will be simple, and the only questions it appears that election officials will have to ask is whether the elector has some form of acceptable picture identification. Local election officials will receive information and training on how to implement the photo identification requirements as provided for by various sections in MCL 168.31 if they are deemed enforceable by this Court. Thus, the Opposing Brief's argument that this process will be burdensome is unfounded speculation.

The Opposing Brief further argues that the affidavit alternative is burdensome because it subjects electors to the challenge process. (Opposing Brief, pp 14-18). The Opposing Brief speculates that "election inspectors and challengers will find a voter's lack of photo identification as sufficiently 'good reason' to question the voter's qualification to vote." (Opposing Brief, p 15). Again, as noted in the Proponent's Brief, the challenge process described in MCL 168.727 applies to all voters. The language in section 523 simply confirms that an elector being allowed to vote without identification under the affidavit alternative *may* be challenged under the provisions of MCL 168.727. The challenge provisions of section 727 are discretionary unless an "election inspector" "knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct," and in that case the inspector "shall" challenge the applicant.[13] Otherwise, section 727 leaves it to the discretion of inspectors or designated challengers to challenge an elector if either knows or has good reason to suspect the elector's qualification and registration. It is certainly possible, if not likely, that some electors offering to vote without

[12] MCL 168.32, as amended by 2005 PA 71, effective January 1, 2007.
[13] MCL 168.727(1).

identification under section 523 will be challenged under section 727. But the Opposing Brief's hyperbolic assertion that "[i]t can be expected that the photo identification requirement . . . will be exploited and that voters using the affidavit procedure will be rigorously challenged," is purely speculative. (Opposing Brief, p 17). There is nothing in section 727 that exposes a voter without photo identification who has signed an affidavit to any different kind of challenge.

Moreover, the challenge process, should it be invoked, is not as burdensome as the Opposing Brief would have this Court believe. The challenge process is tightly controlled by statute and administrative directives.[14] Challenges have to be related to an elector's qualifications or registration, and cannot simply be made to harass or annoy electors.[15] Local election officials are specifically instructed to handle challenges in a prompt and courteous manner, and to follow the procedures carefully to protect the rights of the challenged elector. (Attachment A, pp 6-7.) A challenged elector is prohibited from voting only if he or she refuses to take an oath affirming the elector's intent to answer the questions regarding his or her qualifications truthfully, or refuses to answer appropriate questions, or if the answers to the questions reveal that the elector is not qualified to vote. (Attachment A, p 6).[16] Otherwise, the elector is allowed to cast a specially prepared ballot that is counted like any other ballot.[17]

Thus, in the event an elector offering to vote without identification is challenged, the short additional delay involved in processing the challenge will not severely burden the elector's right to vote. Furthermore, while an elector facing a challenge may feel embarrassed as the

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[14] See MCL 168.727 through 168.734, MCL 168.736, and 168.745 through 168.747, and The Appointment, Rights, and Duties of Election Challengers and Poll Watchers, published by the Department of State, available at http://www.michigan.gov/documents/SOS_ED_2_CHALLENGERS_77017_7.pdf, and attached as Attachment A.

[15] MCL 168.727(1), (3).

[16] MCL 168.729.

[17] See MCL 168.736; 168.745; 168.746.

Opposing Brief suggests, it points to no case law holding that embarrassment is sufficient to constitute a severe burden on the right to vote. More tellingly, the fact that the general structure of the challenge process has been in place for decades and has not engendered any substantive complaints undermines the Opposing Brief's lament that this process is unduly burdensome.

Third, the Opposing Brief asserts that the challenge process is so discretionary that it will result in different standards being used to count the challenged ballots of voters seeking to vote without identification. (Opposing Brief, pp 18, 25). This is an attempt to utilize the United States Supreme Court's decision in *Bush v Gore*, where the Court determined that the use of varying standards from county to county for recounting ballots violated equal protection principles.[18] This decision is inapplicable here because the "standards" for counting a challenged elector's ballot is the same everywhere – if the questions and answers reveal that the elector is a qualified and registered elector his or her ballot will be counted, if the questions do not so reveal, the ballot will not be counted. The minor discrepancies in how questions may be phrased by local election officials to determine an elector's qualifications will thus not vary the actual standard for counting challenged ballots.

Finally, the Opposing Brief argues that the State has failed to demonstrate a compelling state interest in support of section 523 because no evidence has been presented that Michigan has a problem with in-person voter fraud, but rather there is evidence of fraud in the absentee ballot process, which section 523 does not address. (Opposing Brief, pp 18-22). This argument is addressed in the Proponent's Brief at pp 23-25. Nonetheless, since the Opposing Brief fails to demonstrate that any of the provisions of section 523 impose a severe burden on an elector's right to vote, the State need not demonstrate a compelling state interest that is narrowly tailored.

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[18] *Bush v Gore*, 531 US 98, 106-108; 121 S Ct 525; 148 L Ed 2d 388 (2000).

Rather, the State satisfies the constitutional inquiry if it demonstrates important State regulatory interests in support of the requirement.[19] The prevention of election fraud, in whatever form it takes, is at the very least an important state regulatory interest, and research reveals no court holding otherwise. Moreover, the State does not need to wait or provide affirmative proof of a problem with in-person voter fraud before it may take measures to protect against it.[20] While it is true that the State already prohibits and punishes attempts to vote by impersonating another under MCL 168.932, this provision rings hollow absent some mechanism for uncovering the fraud. The photo identification requirement would provide such a mechanism. Otherwise, any discovery of in-person voter fraud is essentially limited to the rare situations where an elector, official, or challenger, has some affirmative knowledge of an elector's fraud, e.g., an election official recognizes that the person purporting to vote as Mrs. Jones, is not Mrs. Jones. The State therefore has demonstrated that it has important interests supporting the minimal burdens imposed on voters associated with section 523.

III. The Michigan Constitution's Equal Protection Clause is coextensive with the United States Constitution's Equal Protection Clause and does not provide any greater protections or require the application of stricter standards when analyzing limitations on the right to vote.

The Opposing Brief essentially argues that because the language of the Michigan Equal Protection Clause includes a reference to "political rights," whereas the federal Equal Protection Clause does not, this Court should read this inclusion as requiring use of a stricter standard for analyzing limitations on the right to vote. (Opposing Brief, pp 34-37.) In other words, while the federal courts may use the *Burdick v Takushi* balancing test, this Court should always apply strict

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[19] *Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992).
[20] *Timmons v Twin Cities Area New Party*, 520 US 351, 364; 117 S Ct 1364; 137 LEd 2d 589 (1997); *Munroe v Socialist Workers Party*, 479 US 189, 195-196; 107 S Ct 533; 93 L Ed 2d 499 (1986).

scrutiny and require the State to demonstrate a compelling state interest in support of limitations on the fundamental right to vote.[21]

Putting aside the significant fact that the reference to "political rights" appears in the non-discrimination clause of Const 1963, art 1, § 2, rather than the Equal Protection Clause, a review of the decisions in election cases since the addition of the "political rights" language in 1963 does not support the Opposing Brief's argument. Each of these decisions applied Michigan's Equal Protection Clause co-extensively with the federal Equal Protection Clause, and relied solely on federal precedent to determine the standard for reviewing limitations on First and Fourteenth Amendment rights.[22] None of these courts gave any indication that there was any reason to "place a higher 'ceiling' on restricting fundamental rights" under Michigan's Equal Protection Clause. (Opposing Brief, p 36). This Court is thus free and in fact should continue to follow United States Supreme Court precedent for reviewing limitations on the right to vote under the state and federal Equal Protection Clauses. Accordingly, the standard to be applied in this case, as set forth in both the Opposing Brief and the Proponent's Brief, is the *Burdick* balancing test.

IV. Section 523 does not violate the state and federal Equal Protection Clauses by imposing a burden on in-person voters that is not similarly imposed on absentee ballot voters.

The Opposing Brief rather confusingly argues that section 523 violates the Equal Protection Clauses because it has a disparate impact on a certain class of voters, i.e., in-person voters. (Opposing Brief, pp 37-38.) The Opposing Brief essentially argues that it violates equal

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[21] *Burdick*, 504 US at 434.

[22] See *Wilkins v Ann Arbor City Clerk*, 385 Mich 670; 189 NW2d 423 (1971); *Socialist Workers Party v Secretary of State*, 412 Mich 571; 317 NW2d 1 (1982); *McDonald v Grand Traverse County Election Comm'n*, 255 Mich App 674; 662 NW2d 804 (2003).

protection principles to impose the photo identification requirement on in-person voters while absentee ballot voters are not faced with the same requirement.

Regardless of whatever theory is used to address this argument, imposing a photo identification requirement on in-person voters and not on absentee ballot voters is permissible. Again, the Equal Protection Clauses do not prohibit the State from distinguishing between groups of individuals.[23] The treatment of in-person voters and absentee ballot voters differently is the inherent result of effectuating two very different voting processes.[24] Moreover, there does not appear to be any logical way to impose section 523's photo identification requirement on absentee ballot voters. Indeed, the law currently provides that applications for absentee voter ballots may be obtained without ever appearing before the local election official and the ballots may be delivered and returned without any in-person contact between the voter and the local election official.[25] Outside of amending the laws to require face-to-face contact at some point in this process, there is no reasonable way to implement a photo identification requirement.[26] Under these circumstances, the fact that section 523 applies only to in-person voters and not to absentee ballot voters does make the requirement unconstitutional under the Equal Protection Clauses.

V. Section 523 is not unconstitutionally vague.

The Opposing Brief argues that section 523 is void for vagueness "because it does not provide fair notice to a prospective voter of what 'other generally recognized picture

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[23] *Plyler v Doe*, 457 US at 216-217.
[24] The State is constitutionally required to provide a method of absentee ballot voting. See Const 1963, art 2, § 4.
[25] See MCL 168.759; 168.761; 168.764a.
[26] To protect against fraud, the absentee voter ballot process relies on signature comparisons and strict rules for obtaining and delivering the absentee ballots. See MCL 168.758-769a.

identification' will be accepted," and does not provide standards for implementing and determining what identification is acceptable. (Opposing Brief, pp 39-40.)[27]

This argument is without merit. Due process requires that a statute be held void for vagueness if it is worded so that someone of ordinary intelligence could not readily identify what conduct violates the law.[28] The phrase "generally recognized picture identification card" is not so vague that a person of ordinary intelligence could not determine what cards might qualify under this section. Notably, a statute is not required to define proscriptions with "mathematical certainty."[29] In this case, an ordinarily intelligent election official will understand this description as including an array of picture identification other than driver's licenses and state identification cards. Moreover, contrary to the Opposing Brief's assertion, the Secretary of State has a duty to promulgate rules, regulations, or directives necessary to implement section 523.

Indeed, the Secretary of State has broad authority to take actions to implement the statutes she is charged with enforcing[30]:

> (1) The secretary of state shall do all of the following:
>
> (a) Subject to subsection (2), issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions

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[27] The Amicus Brief filed by the Governor's Office also asserts that the language is void for vagueness for the same reasons.

[28] *United Food & Commercial Workers Union, Local 1099 v Southwest Ohio Regional Transit Auth*, 163 F3d 341, 358-359 (CA 6, 1998); *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972).

[29] *Grayned*, 408 US at 110.

[30] MCL 168.32, as amended by 2005 PA 71, effective January 1, 2007.

> on assisting voters in casting their ballots, directions on the location of voting stations in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.
>
> * * *
>
> (e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

Accordingly, the Secretary of State has the authority to issue instructions for the implementation of the photo identification cards, including what cards will be acceptable under the "generally recognized" language. Notably, in the 2004 election year, the Bureau of Elections conducted a successful and aggressive information and training program in order to prepare both election officials and voters to comply with the identification requirement imposed on first-time voters who register by mail under the federal Help America Vote Act.[31] This included developing a list of what forms of photo identification would be accepted: driver's license from any state, any state personal identification card, government issued photo identification card, passport, student identification card, credit or automated teller card with photo, military identification card, and an employee identification card.[32] This list is indicative, although not necessarily exclusive, of the types of identification cards that would fall within the "generally recognized" category.[33] Thus, there is no reason to believe that the Bureau of Elections will not be similarly effective in implementing section 523's photo identification requirement. The Opposing Brief's argument that section 523 is void for vagueness therefore fails.

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[31] See 42 USC 15483(b) and MCL 168.509t. See also *Bay County Democratic Party v Land*, 347 F Supp 2d 404, 434-435 (ED Mich 2004) for additional background.

[32] See procedures for implementing the HAVA identification requirement, available at http://www.michigan.gov/documents/Fed_ID_Req_105890_7.pdf.

[33] The Opposing Brief asserts that these examples cannot be used to interpret the "generally recognized" language under section 523 because section 523 "is more restrictive than HAVA." (Opposing Brief, pp 40-41). This argument does not make sense, and is contrary to the Legislature's intent to accept a broad array of picture identification by using the "generally recognized" language in section 523.

VI. Section 523 does not impose a de facto poll tax on voters without identification in violation of the Twenty Fourth Amendment and the Equal Protection Clause.

Finally, the Opposing Brief argues that the incidental costs associated with procuring identification, i.e., the costs of the cards themselves or the costs incurred to procure documents to obtain the identification cards, act as a de facto poll tax in violation of the Twenty Fourth Amendment and the Equal Protection Clause. (Opposing Brief, pp 41-43.) This argument is adequately addressed in the Proponent's Brief at pp 42-46, and for the reasons set forth therein, section 523 does not impose an unconstitutional poll tax in violation of the Twenty Fourth Amendment and Equal Protection Clause.

REPLY TO ISSUE NOT BEFORE THE COURT

VII. The Attorney General has the duty to issue opinions on the constitutionality of statutes and those opinions are binding on state agencies.

The Attorney General briefly responds to matters asserted by the House of Representatives in its amicus curiae brief. The House, in a rather lengthy footnote, gratuitously raises issues regarding the permissible scope and binding effect of Attorney General opinions in its discussion of OAG, 1997-1998, No 6930, p 1 (January 29, 1997). (Amicus Curiae Brief of the House of Representatives, p 3 n1.)[34] Not only are the arguments asserted in this footnote wrong, they require no resolution in deciding the substantive matters at issue in this case.

The Attorney General first notes that there is a question with respect to whether the House's brief is properly before this Court. Although identified as "Brief of the Michigan House of Representatives," neither the brief itself nor a search of the relevant House Journal entries reveals any resolution authorizing the filing of this brief on behalf of the House or authorizing any expenditures that may have been incurred in connection with seeking and obtaining legal

[34] Placement of these arguments in the statement of facts section fails to comply with MCR 7.306(A) incorporating MCR 7.212(C)(6), which requires that the facts be presented "without argument."

services to prepare the brief. While the cover also identifies the Office of the House Speaker, the Speaker does not appear to have any authority to *independently* file a brief espousing a legal opinion on behalf of the House.[35] In any event, regardless of its propriety, the brief's arguments are not well taken here.

Although significant and of great import to the Attorney General, the issues raised by the House do not require resolution here.[36] An advisory opinion under Const 1963, art 3, § 8 presents only an opportunity to address "important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." The issues raised by the House Brief thus fall well outside the scope of the instant advisory opinion regarding 2005 PA 71. Moreover, there is no need to resolve these issues within the confines of this case. The Opposing Brief filed by the Attorney General correctly observed that while OAG No 6930 was binding upon state agencies, including the Department of State, its issuance certainly did not forestall the effective date of 1996 PA 583. (Brief of Attorney General Opposing Constitutionality of 2005 PA 71, pp 5-6.) Therefore, the effect of the opinion's declaration that the photo identification requirements of 1996 PA 583 were unconstitutional is not an issue requiring resolution in deciding the jurisdictional question addressed in Argument I,

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[35] A review of the State Constitution, relevant statutes, and the Standing Rules of the House of Representatives, available at http://www.legislature.mi.gov/documents/publications/rules/house_rules.pdf, did not reveal any specific grant of authority for the House Speaker to take such an action. See also, *Chmielewski v Xermac, Inc*, 457 Mich 593, 609; 589 NW2d 817 (1998) ("the opinion of a single legislator is not necessarily equivalent to the intent of the entire Legislature"), and *Silver v Pataki*, 274 AD2d 57, 62 (2000), aff'd in part rev'd in part *Silver v Pataki*, 755 NE2d 842 (2001) ("The Speaker is a leader of one of two legislative chambers and only exercises such delegated powers as are attendant thereto, granted on the sufferance of the Assembly.")

[36] This Court generally avoids addressing constitutional questions when other questions raised dispose of the case. See *Federated Publs, Inc v Michigan State Univ Bd of Trustees*, 460 Mich 75, 93; 594 NW2d 491 (1999), citing and quoting *Lisee v Secretary of State*, 388 Mich 32, 40-41; 199 NW2d 188 (1972).

supra, or in deciding the substantive issue before this Court of whether the photo identification requirements of 2005 PA 71 are constitutional.

A. The Attorney General has authority to issue opinions on the constitutionality of a statute as a question of law.

Turning to the issues, the first "misconception" asserted by the House is that the Attorney General "has the authority to declare enactments of the [L]egislature unconstitutional and unenforceable." (House Brief, p 3 n 1.) No truly serious effort at supporting this assertion is made where the sole citation offered is a quote from *East Grand Rapids School District v Kent County Tax Allocation Board* that fails to prove the point and, in fact, refutes it by noting it is "universally recognized" that among the "primary missions" of a state Attorney General is the duty to give advice, "including [concerning] the constitutionality of statutes."[37] Indeed, it is difficult to conceive how this proposition can seriously be maintained in the face of MCL 14.32, which provides in relevant part: "It shall be the duty of the attorney general, when required, to give his opinion upon *all questions of law* submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer." (Emphasis added).[38] The meaning of the word "all" is clear, and questions regarding constitutionality are indisputably legal questions.[39]

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[37] *East Grand Rapids School District v Kent County Tax Allocation Board,* 415 Mich 381, 394; 330 NW2d 7 (1982) .

[38] The duty to provide opinions was first imposed by statute in Chapter 12, section 32 of the Revised Statutes of 1846. Some of the earliest opinions were actually hand-written, but the first published opinions date back to 1838. Since that time, formal opinions have been published and indexed in the Biennial Report of the Attorney General, consisting of over 80 bound volumes and including thousands of opinions on a vast spectrum of important issues. They have been relied upon by the courts innumerable times and the vast majority of these opinions have been upheld when challenged.

[39] The Legislature itself has foreclosed any room for debate on this point, its members having submitted numerous opinion requests on the constitutionality of statutes over the years, with at least 145 requests since 1985.

Moreover, the court in *Beer & Wine Wholesalers Association v Attorney General*, confirmed that the Attorney General has a duty to opine on the constitutionality of statutes. There, the plaintiffs alleged that the Attorney General had acted outside the scope of his authority in issuing two opinions concluding in response to requests from a legislator and the then chairman of the Liquor Control Commission that certain rules promulgated by the Commission were unconstitutional.[40] The Court observed that the Attorney General's statutory duty to give opinions on questions of law "requires him to advise members of the Legislature as to the constitutionality of state statutes and administrative rules when so requested" and that the courts held them to be binding on state agencies and officers.[41]

B. The Attorney General's opinion binds state agencies in the absence of a conflicting judicial decision.

The second "misconception" asserted by the House is that Attorney General opinions cannot be considered binding upon state agencies and officers because no law affirmatively provides for this result and no court has specifically addressed the power of the Attorney General to render binding opinions. The House's assertion is untenable. Michigan courts have historically stated that the Attorney General's legal advice as set forth in the opinions is binding upon client state agencies and officers.[42] These pronouncements are consistent with the Attorney General's status as a constitutional officer vested with statutory and common-law powers, and as the State's designated "watchdog" and exclusive legal advisor.

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[40] *Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 301; 370 NW2d 328 (1985), cert den 479 US 939 (1986).

[41] *Beer & Wine Wholesalers*, 142 Mich App at 300-301, citing *Traverse City School Dist v Attorney General*, 384 Mich 390, 410, n 2; 185 NW2d 9 (1971) and *Queen Airmotive, Inc v Dep't of Treasury*, 105 Mich App 231, 236; 306 NW2d 461 (1981).

[42] See, e.g., *Traverse City School Dist v Attorney General*, 384 Mich 390, 410 n 2; 185 NW2d 9 (1971); *People v Waterman*, 137 Mich App 429, 439; 358 NW2d 602 (1984); *People v Penn*, 102 Mich App 731, 733; 302 NW2d 298 (1981); *Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294; 370 NW2d 328 (1985), cert den 479 US 939 (1986).

1. The Attorney General is a constitutional officer and designated "watchdog."

The people first granted the office constitutional status in Const 1835, art 7, § 3, continuing through successive constitutions in Const 1850, art 8, § 1 and Const 1908, art 6, § 1, and finally to the present Const 1963, art 5, § 21. By operation of Const 1963, art 3, § 7, all the powers vested in the Attorney General by the common law "shall remain in force until they expire by their own limitations, or are changed, amended or repealed."[43]

At the 1961 Constitutional Convention, sharp differences emerged as reflected in the majority and minority reports of the Committee on the Executive Branch over Committee Proposal 71, which recommended amending Michigan's Constitution to change the office of the Attorney General and other heads of principal departments from an elective office to one appointed by the Governor. The following remarks advanced in support of the minority report, which ultimately prevailed concerning the status of the Attorney General, illustrate the significance assigned to the Attorney General's opinion-rendering function by the framers[44]:

MR. BINKOWSKI:

* * *

> Mr. Pellow has already commented that the attorney general is the chief law enforcement officer in the state of Michigan. I think that a great number of people, including the delegates here, perhaps are not aware of the multitude of functions that the office has and the effect it has on state government. I'd like your indulgence to quote 3 brief paragraphs from the General Management of Michigan State Government. It is a staff report regarding the reorganization of

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[43] See also *In re Lewis' Estate*, 287 Mich 179, 184; 283 NW 21 (1938) ("[T]he office of attorney general is ancient in its origin and history and it is generally held by the States of the Union that the attorney general has a wide range of powers at common law. These are in addition to his statutory powers."), quoting *Mundy v McDonald*, 216 Mich 444, 450-451; 185 NW 877 (1921).

[44] 1 Official Record, Michigan Constitutional Convention 1961, p 1778. (Emphasis added) It is appropriate to cite the Convention Debates where, as here, they evidence a recurring thread of explanation that binds together the whole of a constitutional concept. *Regents of the University of Michigan v State*, 395 Mich 52, 60; 235 NW2d 1 (1975).

state government in November of 1951. This will give you an idea of the breadth of the office of the attorney general. It says:

* * *

> His activities in the administrative branch of state government are quite varied. *Short of the courts, the formal opinions of the attorney general are the most authoritative statements of the meaning of the laws. Statutes direct the attorney general to give his opinion on any questions of law upon the request of any state official.*
>
> The attorney general gives opinions to more than just state officers. In the field of opinion writing, the attorney general's office is utilized more by the administrative agencies of the state that are under the direction of the governor than by any other class of governmental units.

I think that this gives you a bird's eye view of the functions of the office of the attorney general. This is by far the most important administrative official. *By his decisions, he can stop many of the actions within administrative agencies.* Of course, I think we have seen in recent history an attorney general who in some cases has stopped the program of the governor. *Yet, he is accountable to the people. I think that the will of the people can best be served by an elected attorney general who is primarily responsible to them.*

Ultimately, the delegates agreed on a compromise, with some of the officers subject to gubernatorial appointment and others, including the Attorney General, to be elected. The remarks of Delegate Durst explained the so-called Brake-Durst Amendment that embodied the compromise that was passed by the delegates, including the reasoning behind retaining the Attorney General as an elected officer[45]:

> First of all, this leaves us with an elected attorney general. I can justify somewhat in this instance departing from the principle of appointed department heads, first of all, because this man, as far as I can see it, does not directly engage himself in the day to day administration of government in the way that some of the other administrative officers of the state do. *He is, in a sense, and has been described as a quasi judicial officer, the people's attorney, rendering opinions which may limit the power of the governor or what the governor can do. He is in a sense a watchdog. His opinions stand as a force of law, in effect, until there has been a court decision on the matter.*

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[45] 2 Official Record, Constitutional Convention 1961, p 1789 (Emphasis added).

2. The Attorney General is the State's attorney and chief legal advisor.

In addition to his role as "watchdog," the Attorney General serves as the State of Michigan's exclusive legal advisor.[46] Michigan courts have observed that it is the function and duty of the Attorney General, and of the Attorney General only, to provide legal representation and advice to all client state agencies and officers.[47] For example, in *Attorney General v Public Service Commission*, the Court observed that "[t]he Attorney General is one of only three constitutionally mandated single executives heading principal departments of state government. An elective official, the Attorney General and [his] designated assistants provide legal services to the state of Michigan and its hundreds of agencies, boards, commissions, officials, and employees . . . ."[48] The Court noted the language in the applicable appropriations act specifying that the Attorney General "shall perform all legal services, including . . . rendering legal opinions and providing legal advice to a principal executive department or state agency."[49] In the *Public Service Commission* case, the Court made clear that the Attorney General is the sole legal representative of state officers and agencies in the courts and that they are his clients.[50]

The House's suggestion that these same client agencies and officers are free to disregard advice given in an opinion, flies in the face of the Attorney General's duty to protect the legal interests of both the clients and the State as a whole. Attorney General opinions serve as an important means by which state officers and agencies may seek objective, expeditious, and

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[46] See MCL 14.28, 14.29, and 14.32.
[47] See, e.g., *Babcock v Hanselman*, 56 Mich 27, 28; 22 NW 99 (1885); *Jennings v State Veterinary Bd*, 156 Mich 417, 418; 120 NW 785 (1908). See also *Sprik v Regents*, 43 Mich App 178, 184; 204 NW2d 62 (1972) ("The Attorney General is the exclusive representative of the state before the Court of Claims.")
[48] *Attorney General v Public Service Comm*, 243 Mich App 487, 496, 504; 625 NW2d 16 (2000) (citations omitted).
[49] *Attorney General*, 243 Mich App at 497.
[50] *Attorney General*, 243 Mich App at 504.

inexpensive guidance regarding the laws they must follow and enforce. These opinions settle a broad range of issues that face public servants on a day-to-day basis ranging from such matters as taxation, public schools, elections, appropriations, and incompatible offices to the constitutionality of statutes.[51] It is important to recall that most state agency officials are laypersons who require guidance in the discharge of their duties. Notably, the greatest number of opinion requests as reported in issue after issue of the Biennial Report, are, in fact, submitted by individual legislators, who use opinions to assist in carrying out their duties, to support or question executive department authority, and to provide valuable service to their constituents, including individuals and local units of government.[52] Attorney General opinions may settle a course of conduct where new laws—or new constitutions—have been adopted or old laws present conflicting interpretations or fail to address the question at hand.[53] Moreover, because Attorney General opinions are binding on state officials, courts have held that those who act in

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[51] A recent opinion by the Attorney General illustrates these points well where legislators raised questions about the constitutionality of the laws creating the Jobs for Michigan Investment Fund and the Attorney General's timely guidance stood in the place of potential costly and time-consuming litigation. See, for example, OAG, 2005-2006, No 7195, p___ (July 19, 2006).

[52] Since January 1, 2003, the Michigan Legislature has requested 427 Attorney General opinions.

[53] Indeed, all state Attorneys General across the country render opinions on questions of law in their capacities as their States' chief legal advisors, and in many instances may provide the only authority interpreting seldom-litigated statutory or constitutional provisions. As summarized in one study of opinions:

> [T]he attorney general tends to act where there is a need for explanation of a particular area of the law, where judicial review is absent, and where no legislative provision has been made for defining proper state practice. . . . The attorney general explicates the state of the law, positive and customary. Where law has been struck down, he predicts the consequences. Where it has been obscured, he clarifies its prescriptions. [Henry J. Abraham and Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U Pa L Rev 795, 805, 797-798 (1969).]

accordance with the advice provided receive absolute immunity from liability, protecting the State against otherwise possible money judgments for damages.[54]

Indeed, the House Brief appears to be premised on certain fundamental misapprehensions about Attorney General opinions, reflecting apparent concerns that they constitute participation in the lawmaking or judicial process and that the Attorney General "can effectively veto legislation--without review or appeal." (House Brief, p 4, n 1.) Attorney General opinions, however, do not operate as a veto and do not declare law without redress. This was squarely addressed in the *Beer & Wine Wholesalers* case and rejected.[55] Rather, opinions of the Attorney General are binding on state agencies and officials and no further *until a court otherwise rules.* As noted repeatedly in the many cases cited earlier, those with cognizable interests are free to seek relief in the courts of this State, where opinions of the Attorney General are "persuasive" but carry no binding effect.[56] Significantly, only one attempt by the Legislature to change the established understanding that Attorney General opinions are binding is known to have been made, and that effort was greeted with strong opposition and abandoned.[57]

The House Brief essentially relies on two opinions of this Court for questioning the binding effect of Attorney General opinions—*East Grand Rapids School District v Kent County Tax Allocation Board* and *Danse Corp v City of Madison Heights.*[58] *East Grand Rapids* was a case brought by a local school district against a county tax allocation board challenging the

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[54] See, e.g., *Campbell v Patterson*, 724 F2d 41, 43 (CA 6, 1983).
[55] *Beer & Wine Wholesalers*, 142 Mich App at 301-302.
[56] See *Williams v Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000), citing *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987), and *Indenbaum v Michigan Bd of Medicine*, 213 Mich App 263, 274; 539 NW2d 574 (1995).
[57] See HB 4924 (to amend 1846 RS 12, MCL 14.32) introduced on September 30, 1999 and referred to the Committee on Constitutional Law and Ethics. See also Gongwer New Service, Inc., Michigan Report No. 193, Volume 38 (October 5, 1999).
[58] *East Grand Rapids School Dist*, 415 Mich at 394, and *Danse Corp v City of Madison Heights*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002), cited at House Brief, p 3, n 1;

board's decision to change the way it allocated taxes among local units. As a basis for taking the disputed actions, the board had relied, in part, on an opinion of the Attorney General concluding that the previously governing statute was unconstitutional, prompting the Court to make the following statement (also quoted in the House Brief)[59]:

> While the opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a *governmental agency*, it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice, including advice concerning the constitutionality of state statutes, to members of the legislature, and departments and *agencies of state government.*

Viewing this language in context with the facts, it is reasonable to conclude that the distinction drawn by the Court here is between local "governmental agencies," who are not clients of the Attorney General, and "agencies of state government," who are.

Similarly, in *Danse Corp v City of Madison Heights*, the Court observed in a footnote that "the extent to which a governmental agency is even bound by an opinion of the Attorney General is open to question."[60] A more complete examination of the footnote, however, reveals that, consistent with *East Grand Rapids*, the "governmental agency" referred to there was not a *state* agency but rather a *local* agency. In the footnote, the Court noted that an opinion of the Attorney General was cited as authority by the defendant city to support its view that the assessor's manual it had relied on as a basis for imposing the personal property tax at issue had the force of law. The Court disputed the city's reading of the opinion but then questioned whether the opinion would be binding in any event. As in *East Grand Rapids*, when read in context, it is reasonable to conclude that the Court was questioning the binding nature of the opinion *on the city* and not the binding nature of an opinion on client agencies of the Attorney

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[59] *East Grand Rapids School Dist*, 415 Mich at 393-394 (Emphasis added; footnote deleted.)
[60] *Danse Corp*, 466 Mich at 182 n 6, cited in House Brief, p 3, n 1. This case was decided on application for leave to appeal with no plenary briefing or argument.

General.[61] The Attorney General does not claim that his decisions are binding on local agencies because he does not serve as their legal counsel. Thus, these decisions are not inconsistent with the many others affirming the binding nature of Attorney General opinions on client state agencies and officers.

Because resolution of these issues is not necessary to decide the substantive questions presented in this case, and in light of the consistent treatment accorded Attorney General opinions by the courts, this Court should decline the House's invitation to address these significant questions within the confines of this case.

[61] This crucial distinction is the reason why the Office of Attorney General has never, so far as is known, taken the position that opinions of the Attorney General are binding on local officials or agencies, who have been authorized by the Legislature to hire their own attorneys. See MCL 49.71 and MCL 49.155 (counties); MCL 45.515(a) (charter counties); MCL 41.187 (townships); MCL 62.2 (general law villages); MCL 78.23(b) (home rule villages); and MCL 117.3(a) (home rule cities). Nevertheless, local units of government who disregard Attorney General opinions may do so at some risk in the event a question is later raised whether they acted in good faith. See, e.g., *Bond v Ann Arbor School Dist*, 383 Mich 693, 703; 178 NW2d 484 (1970) ("In the face of the opinion of the Attorney General . . . we do not find upon this record such a showing of good faith by defendant as warrants refusal of relief [refund of illegally collected general fees].")

Conclusion and Relief Sought

Therefore, for all the reasons stated above and in the Brief filed in support of the constitutionality of 2005 PA 71, the Attorney General urges this Court to rule that the photo identification requirements of section 523 of 2005 PA 71, MCL 168.523, on their face, do not violate either the United States Constitution or the Michigan Constitution.

Respectfully submitted,

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